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No. 07-1125

IN THE
Supreme Court of the United States

LINDA AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE
AND RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a Section 1983 claim should be allowed along with a Title IX action where that would be consistent with this Court's rulings on concurrent statutory discrimination claims.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Women Lawyers ("NAWL") is the oldest women's bar association in the country. It was founded in 1899, long before most bar associations admitted women. Only 30 years before, in 1869, Arabella Babb Mansfield had become the first woman lawyer admitted to the (Iowa) bar. Only 20 years before, in 1879, Selva A. Lockwood was the first woman lawyer admitted to the bar of the Supreme Court. In 1912, NAWL campaigned for women's voting rights during the suffrage movement and six years later sought the right for women to serve on juries. In 1957, NAWL President Grace B. Doering became the first woman elected to the ABA Assembly; in 1961 Sarah T. Hughes became the first woman judge on the United States District Court; and in 1981 Sandra Day O'Connor became the first woman to serve as an Associate Justice of this Court. Today, NAWL is a national voluntary organization with members in all 50 states, devoted to the interests of women lawyers, as well as all women. Through its members, committees, and the Women Lawyers Journal, it provides a collective voice in the bar, courts, Congress, and workplace. We stand committed to ensuring access to the courts for girls and women seeking protection from gender bias and sexual harassment.

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[1] Letters of consent are on file with the Clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question posed by this case is of enormous importance. It goes directly to the ability of girls and women to press for equal educational opportunity and freedom from harassment in the schools. NAWL was not a party to the litigation below and does not make a judgment on the propriety of the grant of summary judgment on the Title IX claim. Rather, it files this brief to urge the Court to reject the bright line rule of the First Circuit, which would preclude women and girls from bringing equal protection claims in the public school setting and instead force them to press their constitutional claims under the much higher and more difficult standard of deliberate indifference. This Court, specifically through its decisions of last term, has reiterated its principle that laws against discrimination, especially in the employment setting, should be fought on several fronts. It has extended the number of traditional causes of action that arise from the same facts surrounding the claimed discriminatory behavior – not limited them, as the First Circuit has done. In keeping with the Court's direction, girls and women should not be left to challenge a school, its employees, and its staff on claims of discrimination with only one theory. To the contrary, they should be free to make their challenges on several bases. For all these reasons, NAWL asks this Court to reverse the decision below as to the preclusion issue and allow constitutional claims to go forward under both Title IX and Section 1983.

ARGUMENT

ALLOWING A SECTION 1983 ACTION ALONG WITH A TITLE IX ACTION WOULD BE CONSISTENT WITH THIS COURT'S RULINGS ON CONCURRENT STATUTORY DISCRIMINATION CLAIMS

Recently, this Court issued two decisions that reaffirmed the broad remedial scope of statutory discrimination statutes. Following that same correct analysis, the Court should similarly affirm the need for allowing constitutional clams under Section 1983 as well as Title IX.

CBOCS v. Humphries

First, in *CBOCS West Inc. v. Humphries*, 128 S. Ct. 1951 (2008), the Court held that 42 U.S.C. § 1981 afforded a plaintiff the opportunity to raise claims of retaliation in his claim of racial discrimination. There, Humphries, an African-American Assistant Manager, claimed that he was dismissed because of his race and his complaints that another black employee had been discharged for race-based reasons. *Id.* at 1954. He brought an action under Title VII as well as 42 U.S.C. § 1981. *Id.*

The company there argued that the language of the text of Section 1981 does not expressly refer to the claim of an individual who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his Section 1981

rights. *Id*. Therefore, it argued, the statute simply "does not provide for a cause of action based on retaliation. " *Id.* This Court stated that "[w]e agree with CBOCS that the statute's language does not expressly refer" to such a claim, but cautioned "that fact alone is not sufficient to carry the day." *Id.* After all, "the Court has recently read another broadly worded civil rights statute, namely, Title IX [citation omitted] as including an antiretaliation remedy." *Id.* As for the company's argument that Congress amended Section 1981 but did not include an explicit antiretaliation provision or the word "retaliation" in the new statutory language, the Court found that "there was no need for Congress to" do so. *Id.* That is because "[n]othing in the statute's text or in the surrounding circumstances suggests any congressional effort to supercede" its previous interpretation. *Id.*

In response to the company's argument that Title VII already contains procedural and administrative requirements and "overlaps" Section 1981, this Court stated:

> Regardless, we have previously acknowledged a "necessary overlap" between Title VII and § 1981. [Citation omitted.] We have added that the "remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." [Citation omitted.] We have pointed out that Title VII provides important administrative remedies and other benefits that § 1981 lacks. [Citation omitted.] And we have concluded that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." [Citation omitted.] *In a word, we have previously held that the "overlap" reflects congressional design.* [Citation omitted.] We have no reason to reach a different conclusion in this case.

Id. (emphasis added).

The same can be said for claims under Title IX and Section 1983. Although there may exist an "overlap" or relation between both causes of action, their "ends" are separate in how each is prosecuted, the evidence required for each such cause of action, and the parties affected by each cause of action.

Gomez-Perez v. Potter

Similarly, in *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943 (2008), this Court recognized a retaliation claim

under the Age Discrimination in Employment Act of 1967 as amended ("ADEA"), 29 U.S.C. § 633a(a). Again, it upheld additional theories to combat illegal discrimination, holding that a federal employee could assert a claim under the federal-sector provision of the ADEA. *Id.* at 1935. In that case, a 45-year old woman brought suit against her federal employer, initially claiming age discrimination and then claiming that her employer retaliated against her for bringing the prior action. *Id.* The employer moved for summary judgment, which the district court granted. *Id.* The First Circuit affirmed the order but on the grounds that § 633a(a) of the ADEA did not allow recovery for retaliation claims. *Id.* at 1935-36.

In discussing whether the federal employer had waived sovereign immunity, this Court stated the following:

[The employer] is of course correct that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996). But this rule of construction is satisfied here. Subsection (c) of § 633a unequivocally waives sovereign immunity for a claim brought by "[a]ny person aggrieved" to remedy a violation of § 633a. Unlike § 633a(c), § 633a(a) (2000 ed., Supp. V) is not a waiver of sovereign immunity; it is a substantive provision outlawing "discrimination." That the waiver in § 633a(c) applies to § 633a(a) claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c). See *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472-473 (2003) (where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (quoting *United States v. Mitchell,* 463 U.S. 206, 218-219 (1983))). But in any event, even if § 633a(a) must be construed in the same manner as § 633a(c), we hold, for the reasons previously explained, that § 633a(a) prohibits retaliation with the requisite clarity.

Id. at 1942-43. Once again, the Court did not force the plaintiff to overcome a high hurdle in order to maintain her cause of action for retaliation.

In these two cases, the Court has reaffirmed a commitment to promoting varied causes of action to alleviate discriminatory practices. It has not limited the means by which these ends are sought. To the contrary, it has expanded the means to accomplish these ends and read the anti-discrimination statutes expansively, so as to encompass those causes of action that would logically ensue from claims of discrimination. In contrast, the First Circuit in *Fitzgerald* has taken precisely the opposite tack, *i.e.*, limited the number of ways in which to recover for discrimination.

The Court has also made clear that a public sector plaintiff claiming discrimination based on gender can bring a Title VII claim, a § 1983 claim (alleging violations of equal protection), or both. *See Davis v. Passman*, 442 U.S. 228, 234-35 (1979); *Annis v. County of Westchester*, 36 F.3d 251, 254-55 (2d Cir. 1994) (noting "every circuit that has considered this issue has held that Title VII is not the exclusive remedy for discrimination against state or municipal employers, where those claims derive from violations of Constitutional rights."). Likewise, a plaintiff who claims gender discrimination in the public school setting deserves the same opportunities. Assuming that she can prove independent bases for a Title IX claim as well as a § 1983 claim, she should be able to go forth with both or either causes of action. To hold

otherwise would defeat the purpose behind both statutes and go against the reasoning this Court has wisely followed in other discrimination cases.

In conclusion, as the Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. *Id.* at 685. And for half a century thereafter, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *United States v. Virginia,* 518 U.S. 515, 532 (1996). It was not until 1971 that, for the first time in our history, this Court ruled in favor of a woman who complained that her state had denied her the equal protection of its laws. *Reed v. Reed*, 404 U.S. 71, 73 (1971). Since *Reed,* the Court has repeatedly recognized that neither federal nor state government, nor this nation's schools, act compatibly with the equal protection principle when they deny "to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. at 532.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed as to the preclusion issue.

Respectfully submitted,

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